

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.111.5.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

WILLIAM J. CALISE, JR. etc.,

Plaintiff and Respondent,

v.

JAMES DAVID HUGHES et al.,

Defendants and Appellants.

2d Civil No. B213321
(Super. Ct. No. 1303105)
(Santa Barbara County)

James David Hughes and Laura S. Hughes appeal from an order denying their motion to arbitrate a real estate action brought by buyer, William J., Calise, Jr., Trustee of the William J. Calise, Jr. Living Trust Dated May 10, 2007. (Code Civ. Proc., § 1294, subd. (a).)¹ The motion was denied because Hughes' broker (Sotheby's International Realty, Inc., Lisa Loiacono and Bob Lamborn) is a defendant in the action but not a signator to the arbitration agreement. The trial court found that arbitration of the action without broker could result in conflicting rulings. (Code Civ. Proc., § 1281.2, subd. (c)(1).) We affirm.

Procedural History

This action was filed after Calise (buyer) purchased a Montecito residence from James David Hughes and Laura S. Hughes (seller) for \$7.05 million. Buyer

¹ All statutory references are to the Code of Civil Procedure.

claimed that seller and broker failed to disclose that part of the garage was converted without permits. The complaint seeks damages for fraud, breach of contract (seller only), concealment, negligent misrepresentation, and conspiracy to commit fraud.

Seller moved to compel arbitration based on an arbitration provision in the purchase agreement. Although broker was not a signatory to the purchase agreement, seller argued that broker had a duty to arbitrate the dispute based on broker's agency relationship with seller.²

Broker opposed the motion on the ground that the purchase agreement states that broker does not have to arbitrate buyer-seller disputes. The listing agreement provides that broker is only required to arbitrate compensation matters.

The trial court denied the motion to compel arbitration on the ground that broker was not a signator to the arbitration agreement. It found that arbitration of the action could result in conflicting rulings and that "it would be unnecessarily duplicative to have the claims against the Sellers arbitrated and the claims against the Brokers tried by the Court. Therefore the Court will exercise its discretion under CCP §1281.2(c)(1) and not enforce the arbitration agreement against the Plaintiff [i.e., buyer] and proceed to try all the claims."

Agreement to Arbitrate

"[S]ubject to limited exceptions, only parties to an arbitration contract may enforce it or be required to arbitrate. [Citation.]" (*Nguyen v. Tran* (2007) 157 Cal.App.4th 1032, 1036.) A nonsignatory, however, "may be required to arbitrate, and may invoke arbitration against a party, if a preexisting confidential relationship, such as an agency relationship between the nonsignatory and one of the parties to the arbitration agreement, makes it equitable to impose the duty to arbitrate upon the nonsignatory.

² Buyer conditionally opposed the motion, stating that if broker is compelled to arbitrate the dispute, buyer agreed to arbitration. Buyer argued: "If the Broker Defendants are not compelled to arbitrate, [buyer] objects to arbitration under Code of Civil Procedure section 1281.2(c)."

[Citation.]" (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 765 (*Westra*).)

In *Westra*, a real estate broker brought a motion to arbitrate a fraud action based on the theory that broker's dual agency with buyer and seller gave it the right to compel arbitration. The Court of Appeal held: The language of the purchase agreement, as well as the arbitration provision itself, clearly states that the [buyers], [broker], and [seller] agreed to arbitrate disputes involving the subject matter of the purchase agreement. . . . This language was thus binding on [broker] as well as the [buyers], and [broker] as an agent is entitled to enforce the arbitration agreement, to which the [buyers] and [seller] agreed. [Citations.]" (*Id.*, at p. 766.)

Unlike *Westra*, broker did not agree to arbitration. The purchase agreement provides that broker, at his or her option, may participate in arbitration but does not have to do so.³

Reciprocal Right to Compel Arbitration

Seller argues that broker's agency relationship creates a duty to arbitrate the dispute. If broker can compel arbitration based on an arbitration agreement signed by seller (i.e., *Westra*), then seller should have a reciprocal right to compel the broker to arbitrate disputes.

We reject the argument because broker's relationship with seller is that of a special agent with limited powers. (*Nguyen v. Trans, supra*, 157 Cal.App.4th at p. 1038;

³ Paragraph 17.B. of the real estate purchase agreement states in pertinent part:
"ARBITRATION OF DISPUTES: (1) Buyer and seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration, including and subject to paragraphs 17(B)(2) and (3) below."

Paragraph 17.B.(3) provides: "BROKERS: Buyer and Seller agree to mediate and arbitrate disputes or claims involving either or both Brokers, consistent with 17A and B, provided either or both Brokers shall have agreed to such mediation or arbitration prior to, or within a reasonable time after, the dispute or claim is presented to Brokers. Any election by either or both Brokers to participate in mediation or arbitration shall not result in Brokers being deemed parties to the Agreement."

2 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 3.4, p. 14.) An agent may have authority to bind his or her principal to arbitration, but a principal has no reciprocal power to bind the agent. (See Civ. Code, § 2337 [instrument which binds principal does not bind agent unless "intent is plainly inferable from the instrument itself"].) "Normally the agent will not be liable on a written contract made in the name of the principal. [Citation.]" (3 Witkin, Summary of Cal. Law (10th ed. 2008) Agency and Employment § 196, pp. 248-249; see e.g., *Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 646 [special agency terminates after property sold].)

In *Nguyen v. Tran*, *supra*, 157 Cal.App.4th 1032 (*Nguyen*), a real estate fraud case, the purchase agreement contained an arbitration provision identical to the one in the present case (ante fn. 3). It provided: "'Buyer and Seller agree to mediate and arbitrate disputes or claims *involving either or both Brokers . . . provided either or both Brokers shall have agreed to such mediation or arbitration* prior to, or within a reasonable time after, the dispute or claim is presented to Brokers.'" (*Id.*, at p. 1038.)

The cooperating broker in *Nguyen* demanded arbitration but the listing broker (seller's broker) "did not agree to arbitration or mediation. . . . And although sellers and buyers agreed to arbitrate disputes between them and the brokers, if either or both brokers agreed, listing brokers never consented to arbitrate anything. Thus, there is no evidence of an agreement to arbitrate by listing brokers." (*Ibid.*)

The court in *Nguyen* concluded that the cooperating broker could not compel the listing broker to arbitrate the dispute. (*Id.*, at p. 1038.) The cases, "[a]t most, . . . may allow listing brokers the right to require buyers to arbitrate their claims against them *should they so choose, and vice versa*. But nothing in them allows cooperating brokers to force listing brokers to do so." (*Id.*, at p. 1039, emphasis added.)

The "vice versa" language is dicta and not controlling. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 503, pp. 572-574.) The *Nguyen* court distinguished between listing brokers and cooperating brokers, and applying well established law, held that a listing broker could not be compelled to arbitrate the dispute. (*Id.*, at pp. 1038-1039.) The court saw "no basis to create another exception to the general rule that an

arbitration provision cannot be enforced to compel a nonsignatory to arbitrate. Cooperating brokers and listing brokers [are] free to enter into a written arbitration agreement if they so desire. They did not and there is no factual or legal basis for us to impose an obligation to arbitrate under these circumstances." (*Nguyen, supra*, 157 Cal.App.4th, at p. 1039.)

The same principle applies here. A nonsignatory broker sued by a buyer may compel arbitration based on an arbitration provision in the purchase agreement where the broker is sued in his or her capacity as the buyer's or seller's agent. (*Westra, supra*, 129 Cal.App.4th at p. 766; *Nguyen, supra*, 157 Cal.App.4th at pp. 1037-1039; Greenwald & Asimow, Cal. Practice Guide (2008) Real Property Transactions, ¶ 4:495.5, p. 4-122.) Seller, however, cites no published case that the reverse is true, i.e., that the signatory to an arbitration agreement can compel a nonsignatory broker to arbitrate an action where the broker has not agreed to arbitration. "All nonsignatory arbitration cases are grounded in the authority of the signatory to contract . . . on behalf of the nonsignatory – to bind the nonsignatory in some manner." (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 243.)

The trial court reasonably concluded that seller was estopped by the purchase agreement and listing agreement which provide that broker is only required to arbitrate compensation disputes. As a special agent with limited powers, broker has no legal or equitable duty to arbitrate a fraud action that seeks compensatory and punitive damages in excess of \$2 million. (*Nguyen, supra*, 157 Cal.App.4th at pp. 1038-1039.)

Third Party Beneficiary

Seller asserts that broker is bound by the arbitration agreement as a third party beneficiary. (See *Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 599-600.) " 'But [case law] consistently requires a *direct* benefit under *the contract containing an arbitration* clause before a reluctant party can be forced into arbitration. [Citations.]' [Citation.]" (*Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1070-1071.) Nothing in the purchase agreement states that the arbitration provision was for the benefit of broker. (See *Neverkovec v. Fredericks* (1999)

74 Cal.App.4th 337, 349 [party urging third party beneficiary theory has burden of proof].) To the contrary, it warns: "Real Estate Brokers are not parties to the Agreement between Buyer and Seller."

We reject the argument that broker has a duty to arbitrate the action based on a third party beneficiary theory. "A third party beneficiary . . . cannot be *bound* to a contract it did not sign or otherwise assent to. [Citations.]" (*Comer v. Micor, Inc.* (9th Cir. 2006) 436 F.3d 1098, 1102.) Nor does public policy favor arbitration of disputes that a party has not agreed to arbitrate. (*Medical Staff of Doctors Medical Center v. Kamil* (2005) 132 Cal.App.4th 679, 684.) "The fact that a nonsignatory to a contract may in some circumstances be viewed as a third party beneficiary or an agent who is entitled to *compel* arbitration [citation] is legally irrelevant where, as here [broker] *is not the one who wants to be bound by the arbitration provision in a contract* [Citation.]" (*Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 991.)⁴

Piecemeal Arbitration - Conflicting Rulings

Section 1281.2, subdivision (c)(1) vested the trial court with the discretion to deny arbitration where there is a pending action arising out of the same transaction and trial of the action could result in conflicting rulings. Buyer's action against seller and broker involves common factual and legal issues. The trial court did not err in concluding that arbitration of the action without broker could result in conflicting rulings. (See *Mercury Ins. Group v. Superior court* (1998) 19 Cal.4th 332, 350; *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393.)

⁴ Seller, in his reply brief, argues that the third party beneficiary exception applies because the purchase agreement provides that seller will compensate broker upon completion of the sale. Broker, however, agreed only to arbitrate compensation matters, not buyer-seller disputes. That is the outer limit of the third party beneficiary exception, assuming that it applies. Under seller's construction of the law, anyone providing services to complete the sale (i.e., the escrow officer, the title insurance company, the pest control inspector, or the mortgage lender) is a third party beneficiary and could be compelled to arbitrate the dispute if sued as a defendant. "It is one thing to permit a nonsignatory to relinquish his right to a jury trial, but quite another to compel him to do so." (*Benasra v. Marciano, supra*, 92 Cal.App.4th at p. 991.)

The judgment (order denying motion to compel arbitration) is affirmed.
Seller to pay costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

James W. Brown, Judge
Superior Court County of Santa Barbara

Nelson E. Brestoff, a Professional Corporation, for Appellants.

Seed Mackall, Peter A. Unoff and Alan D. Condren. William J. Carlise, Jr.,
in pro per, for William J. Carlise, Respondent.

Kevin H. Louth, Victor Rocha and Fredric W. Trester; Manning & Marder
Kass, Ellrod Ramiez, for Sotheby's, Lojacono and Lamborn, Respondents.